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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York,

Petitioner,

against

LAWRENCE WILLIAM WRIGHT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONSE NOT PRINTED

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Petitioner prays that a writ of certiorari issue to review a portion of the decision of the United States Court of Appeals for the Second Circuit in the case of *Lawrence William Wright* v. *Daniel McMann,* which was decided on March 16, 1972.

Opinions Below

The opinion of the Court of Appeals which petitioner seeks to review is not yet reported. It is filed with this petition as Appendix "A". The decision of the United States District Court for the Northern District of New York, dated July 31, 1970, which was reviewed by the Court of Appeals is reported at 321 F. Supp. 127. This opinion and the orders entered thereon are filed herewith as Appendix "B".

A previous opinion of the Court of Appeals for the Second Circuit reversing a decision of the Northern District Court dismissing the complaint, is reported at 387 F. 2d 519 (1967). A copy of this decision is filed herewith as Appendix "C". The decision of the District Court dismissing the complaint is reported at 257 F. Supp. 739 (1966), and is filed herewith as Appendix "D".

Jurisdiction

The decision of the Court of Appeals was rendered on March 16, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Question Presented

Whether the Court of Appeals properly affirmed an award of compensatory damages against petitioner McMann in a suit brought by respondent Wright pursuant to Section 1983 of the Federal Civil Rights Act for alleged unconstitutional treatment at a prison at which petitioner was the warden?

Statutes Involved

42 U.S.C. § 1983

"Civil Action for Deprivation of Rights

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proceeding for redress."

Statement of the Case

A. Procedural Background

Respondent Lawrence Wright is an inmate of the New York State correctional system who is serving a sentence of one day to life imprisonment for the crime of sodomy. Respondent instituted this Civil Rights Action pursuant to 42 U.S.C. § 1983 in the Northern District of New York, in March, 1966, while he was incarcerated at the Clinton Correctional Facility. The gravamen of Wright's complaint was that his federal constitutional rights were violated by petitioner McMann and by other prison personnel while he was confined for two periods in the segregation unit of Clinton Correctional Facility, during 1965 and 1966. Wright alleged that he was beaten by the guards, deprived of legal materials and forced to endure freezing temperatures and filthy conditions while remaining nude in a cell that was stripped of all furnishings.

The District Court (BRENNAN, D.J.) dismissed the complaint on August 31, 1966. It held that Wright's case did not fall within the exception to the general rule that federal courts would not interfere in cases involving the internal management of state prisons. It further held that Wright's grievances concerning the conditions of his confinement and the procedures used to impose discipline on him were properly the subject of a suit in the state courts in the first instance. See 257 F. Supp. 739 (Appendix "D").

The decision of the District Court was reversed by the Court of Appeals for the Second Circuit on December 19, 1967. The Court of Appeals held that the absence of injunctive relief in the New York courts, and the absence of a complex scheme of state law, prevented the Court from dismissing the action under the exhaustion of state remedies doctrine or the absention doctrine. The Court further noted that if the conditions alleged by Wright were true,

they would have constituted cruel and unusual punishment in violation of the Eighth Amendment. Accordingly, the Court reversed the dismissal of the complaint and remanded the case for further proceedings in the District Court. See 387 F. 2d 519 (Appendix "C").

On August 29, 1968 the District Court (FOLEY, D.J.), consolidated Wright's case with the case of another Clinton inmate, Robert Mosher, who had filed a lawsuit raising similar constitutional claims. The consolidated cases were brought to trial in October, 1968, during which the District Court (sitting without a jury), heard the testimony of 26 witnesses for a period of seven days.

On July 31, 1970 the District Court rendered a lengthy decision in which it awarded respondent Wright $1500 in compensatory damages against petitioner McMann, and issued certain injunctive relief on Wright's behalf. On August 19, 1970 the District Court embodied this relief in an unreported decree. The relief granted was as follows:

(a) Petitioner and his co-defendant, Superintendent J. Edwin LaVallee,* were enjoined from using segregated confinement until they promulgated rules and regulations ensuring that segregation cell facilities were adequate to safeguard the health of occupants, that heat and ventilation were sufficient, that nudity could not be enforced solely as a disciplinary measure, and that provisions be made for surprise inspection visits by trained supervisory personnel;

(b) Petitioner and Superintendent LaVallee were required to promulgate, and submit for the District Court's approval, rules and regulations governing procedures of prison disciplinary hearings, and rules and regulations governing the condition of psychiatric observation cells as

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* J. Edwin LaVallee replaced Daniel McMann as the Superintendent of Clinton Correctional Facility in January, 1968.

well as the procedures used to determine whether an inmate should be confined to such a cell;

(c) As to Wright and his co-plaintiff Mosher, petitioner and Superintendent LaVallee were enjoined from placing them in segregation or depriving them of good behavior allowances without affording them prior notice of charges, the right to "appropriate" representation at a disciplinary hearing, the right to call witnesses and to have decisions reviewed administratively and the right to have definite sentences imposed for segregated confinement.

(d) As to plaintiff Mosher, Superintendent LaVallee was ordered not to "censor or interfere in any way with any correspondence" between Mosher and his attorney, and ordered to restore 616 days of good behavior allowance which Mosher lost while in segregation.

(e) Petitioner and Superintendent LaVallee were also enjoined from placing Wright or Mosher in psychiatric observation cells for disciplinary purposes or without psychiatric justification, and from prohibiting inmates to give legal advice or assistance to each other subject to reasonable regulations. (See decrees of August 19, 1970 in Appendix "B").

On March 16, 1972 the decision of the District Court was affirmed in part, reversed in part and modified in part by the Court of Appeals for the Second Circuit. The Court of Appeals, following its own decision in *Sostre* v. *McGinnis*, 442 F. 2d 178 (1971), cert. denied sub nom. *Sostre* v. *Oswald*, 404 U.S. 1049 (1972), and *Oswald* v. *Sostre*, 405 U.S. 978 (1972), reversed the requirement that prison officials use trial-type procedures in sending inmates to segregation units or psychiatric observation cells, and reversed the requirement that petitioner and Superintendent LaVallee submit rules and regulations for the District Court's approval. The Court of Appeals modified the portion of the District Court's decision which prohiibted the prison officials from censoring Mosher's correspondence with his

attorney, and held that the prison officials could open and read such correspondence but could not interfere with it absent a clear abuse of access to the mails.

With respect to the damage award, which is the subject of the instant petition, the Court of Appeals affirmed the award to Wright of $1500 compensatory damages against petitioner McMann. The Court of Appeals noted that although the District Court did not make specific findings that the Warden had imposed the deprivations which the District Court found to be unconstitutional or had actual knowledge of them, there was evidence in the record for the Court of Appeals to conclude that petitioner actually knew of the conditions in the Clinton segregation unit when Wright was confined there. In addition the Court held that petitioner was charged with such knowledge because the New York Correction Law and the Employees Rule Book of the New York State Department of Correctional Services, entrusted the Warden with the management and supervision of the prison and required him to keep daily records of the punishments inflicted on prisoners.

In a concurring opinion, Circuit Judge Oakes stated that he would favor judicial intervention to establish minimal correctional standards, but he did not believe that the instant case was an appropriate vehicle for such action. He also expressed the view that a re-examination of the Court's position on mail censorship would be appropriate in a later case, but not the instant case.

Circuit Judge Hays, dissenting in part, stated that he opposed the restoration of good behavior allowance to plaintiff Mosher because Mosher was not subjected to extreme physical abuse and was not punished for engaging in constitutionally protected activities. With respect to the damage award against petitioner McMann, Judge Hays disagreed with the affirmance of that award by the majority of the Court. Judge Hays stated that the argument that petitioner was charged with knowledge because of his

statutory duties, advanced a theory of vicarious liability which was inappropriate in civil rights cases.

B. Factual Background

At his trial in the Northern District of New York in 1968, respondent Wright gave the following testimony concerning the periods of segregated confinement for which the District Court awarded compensatory damages. On February 18, 1965 Wright was charged with violating prison rules by distributing information about inmates which he had obtained from hospital files. Wright admitted to the Deputy Warden that he was guilty of the charge, and was sent to the segregation unit until further orders.

Wright testified that he was placed nude in a cell in the segregation unit, and that the cell was stripped of furnishings. He said that the cell was dusty and dirty, and reeked with the stench of urine and excrement. He said that there was one toilet, which was encrusted with filth and slime, one sink with cold running water, and no furniture or bed or mattress or cleaning implements. He said the cell was seven feet wide, eight or nine feet long, nine feet high, and was fronted with bars, but did not have a light. He said he was able to talk to other inmates if they were housed next door.

Wright stated that he was forced to sleep on the concrete floor, and that his body became numb from cold air coming through the windows and from the absence of heat in the radiator. He said he was awakened at 7:30 A.M. and forced to stand at attention at the bars of his cell every time an officer passed by, until 10 P.M.

Wright testified that he could not receive his Bible or attend religious services for the 33-day period that he was confined in a strip cell. He said that he did not receive any legal materials until he had been in the strip cell for six days, and then received some law books and some legal

pads and pens and pencils. He said that on March 26, 1965 petitioner McMann permitted him to have the remainder of his legal materials when he left the strip cell.

Wright stated that while he was in the strip cell he suffered from dizziness, nausea, blackouts and vomiting, and experienced swelling in his legs and feet. He said that one of the prison physicians denied his request for medical care, and another prison physician merely gave him two aspirins. He said he was not taken to see a dentist until he was removed from the strip cell, and that a physician did not make daily rounds in segregation in 1965.

Wright testified that he was not permitted to have his glasses when he was placed in the strip cell, and that he had to do without them for one and a half weeks, although he was still able to write. He said petitioner McMann granted him permission to have his glasses on request.

Wright stated that he was kept nude in the strip cell for the first eleven days, and remained there until March 26, 1965, when he was transferred to another section of the segregation unit where he received more privileges. He said he was sent to a psychiatric observation cell in April, 1965 because of some difficulties he was having with another inmate, and remained there for three and one half days. He described the cell as having a solid door with a six inch by six inch panel cut out of it to enable outsiders to look in. He said the cell was a regular room with a window in the back and the window was covered by a metal screen, and could be opened by an officer who had a key to the screen. A recessed light was in the ceiling.

The dimensions of the psychiatric observation cell were approximately nine or ten feet in length and eight or nine feet in width. Wright said that the cell had no furnishings or toilet or sink, and that he was given a two inch mat to sleep on at night and had to ask the officers to es-

cort him to the bathroom. He said that he was not given a toothbrush or toothpaste or anything for his sanitary needs, and that he suffered from the cold when the windows were left open and experienced blackouts and dizzy spells. He said a ceiling light was kept on during the night but not during the day.

Wright said that he saw the prison psychiatrist and other doctors on a daily basis while he was in the observation cell, and then was returned to the segregation unit.

In February, 1966 Wright was brought up on charges again, as a result of an altercation with the guards. He said that the Deputy Warden sentenced him to segregation until further orders, and that the guards who brought him to segregation threatened and abused him. He said that when he arrived at the segregation unit, he was forced to remove all of his clothing and placed in a strip cell.

Wright said that the cell was barren and contained no lighting facility or cleaning implements or anything to sleep on. He said that there was debris on the floor, including hair and particles of clothing, and that the toilet and sink were encrusted with slime and other residue. The cell was the same size as the strip cell he had previously been placed in.

Wright stated that he was given all of his legal materials two and a half days after he arrived in segregation but his request for a Bible and prayer book were denied. He said his clothing was not returned to him and he was not given underwear or a covering. He said he remained in the strip cell for 21 days from February 10, 1966 to March 3, 1966, when he was released to the general population after filing the complaint in the instant case. He said that during his confinement he was threatened by the officers for instituting a legal action.

Wright testified that he was sent to segregation for a third time in 1967, and that conditions there had vastly

improved. He said he was given cleaning implements, clothing and bedding, and some hygienic implements, but that there were some insects present and his mattress and pillow were dirty. He said he remained in segregation in 1967 for 30 days.

With regard to his three periods of segregated confinement, Wright testified to the following loss of privileges. He said there were no exercise privileges, no earphones, no movies, no opportunity to earn money or to earn good time credit, no commissary purchases, except legal materials, and no personal letters except a Sunday letterhead. He said he was also denied therapeutic and educational programs and religious services. He said that the food was wholesome, but the proportions were too small and he received desserts only occasionally and rarely received fresh fruits. He said he lost sixteen or seventeen pounds, although he acknowledged he never complained about the food.

Wright also stated that there was no counselling program or psychiatric care in the segregation unit. He said the segregation unit was in a separate box-type building surrounded by a ten foot steel fence, and had no connection with the observation cells in the prison hospital. The interior of the building contained an exercise yard, and the individual cells opened into small exercise patios behind them.

Wright further testified that during his 1965 confinement in the strip cell he was given cotton underwear and toilet paper after eleven days, but that prior to that he suffered from the cold and had to use his hands to clean himself. He acknowledged that the radiator in his cell gave off some warmth and that during the day the temperature would be between 80 and 85 degrees, but that the temperature would drop in the late afternoon when the officers opened the windows to allow ventilation.

Wright stated that he wrote interview slips to prison personnel complaining about conditions in segregation, and also wrote to the Commissioner of Correction, the FBI and the state courts. He said he did not hear from petitioner McMann, but two FBI agents interviewed him in 1965 and 1966, and he told them about the conditions he endured. He said that both times the Department of Justice informed him that no action would be taken.

Wright said that many officers made rounds in segregation and saw him in the nude, and he complained to them. He said that the Deputy Warden told him he would do something about his complaints, but also told him the nudity was part of the punishment and that his length of stay in segregation was up to him.

Wright stated that the Catholic Chaplain visited him in segregation in 1965, and visited him again in 1966 and administered ashes. He also said that in 1965 and 1966 he was able to obtain legal materials from the commissary.

Wright also testified that in the strip cell his body developed a stench because he could not wash himself, and that he had to use his hands after using the toilet. He said he would place his food on the floor, and sometimes had to eat after going to the bathroom.

In addition to Wright, ten other Clinton inmates testified about the conditions in the segregation unit, claiming that the cells were dirty and that they did not contain cleaning implements and other necessary articles.

On behalf of the defendant prison officials, two Deputy Wardens, who were in charge of the segregation unit from 1960 to 1965, and from 1965 to the present, testified about the practices in segregation. They denied that the cells were in the condition stated by Wright and the other inmates, and said that many implements and furnishings were removed from the cells for safety reasons. One Deputy Warden stated that petitioner McMann had dele-

gated to him the power of imposing disciplinary punishments, and had informed him in no uncertain terms that officers were not to use profanity or to lay hands on inmates. The other Deputy Warden stated that in 1966 he ordered Wright to be kept nude for a week, and then rescinded the order.

In addition to the Deputy Wardens, six segregation officers testified that the inmates in segregation were given clothing and cleaning implements, and were able to keep their cells in clean conditions. Another officer testified that the prison physicians made daily rounds in segregation.

Petitioner McMann testified that he was the Warden of Clinton Correctional Facility from January, 1964 to January, 1968. He said he delegated responsibility to his Deputy Wardens for disciplinary matters, and that in March, 1965 he directed the Deputy Warden to give segregation inmates trousers and shirts, in addition to long underwear. He said that in 1966 he directed the Deputy Warden not to place inmates in strip cells in the nude, but to give them long underwear and socks, and a mattress and blanket at night. He said that prior to this time he had believed to the best of his knowledge that inmates were receiving a mattress or a blanket.

McMann stated that he never saw filthy conditions at Clinton, and did not permit them. He said it would have violated the customary rules of the institution if officers failed to give inmates implements to clean themselves or toilet articles. McMann said that early in 1966 he discovered that Wright had been placed nude in a strip cell for a period of time, and he directed the Deputy Warden that in the future no man would be placed nude in the strip cell.

Subsequent to the trial in 1968 and the District Court's decision in 1970, but prior to the decision of the Court of

Appeals in 1972, the New York State Department of Correctional Services promulgated extensive regulations to prevent any cell from being maintained in a degrading or unhealthy condition, and to insure that all inmates received adequate clothing, furnishings and hygienic implements. In addition the New York Legislature amended the Correction Law to provide that segregation inmates were to receive suitable clothing, sufficient quantities of wholesome food, adequate sanitary and other conditions required for health, and access to a physician on a daily basis after the first 24 hours. These changes were noted by the Court of Appeals in reversing the portion of the District Court's order which required the defendant prison officials to submit rules and regulations for the District Court's approval.

Reasons for Granting the Writ

The affirmance of the damage award against petitioner McMann by the Court of Appeals was tantamount to holding him vicariously liable under the Civil Rights Act since there was no evidence that petitioner personally imposed the deprivations on respondent which the District Court found to be unconstitutional. Such vicarious liability is unsound and has been rejected by other Courts of Appeal.

In its decision awarding compensatory damages to respondent Wright, the District Court made specific findings that Wright was kept nude in a strip cell for disciplinary purposes, in 1965 and in 1966. The District Court also found that Wright was deprived of hygienic implements, and that these things were kept on the window sills outside the strip cells, only to be handed to the inmates by the guards on request. The District Court further found that part of the strip cell treatment was to keep the cells in not too clean a condition, and that at times the temperature was cold to an inhumane degree, and caused extreme discomfort to the inmates.

While it rejected a defense of good faith or probable cause, and noted that there was a design to avoid written rule-making and to put the inmates in the hands of guards under unsanitary conditions, to make the inmates subservient, the District Court made no specific findings that petitioner McMann had personally imposed the deprivations on respondent Wright which were the basis of the damage award. Indeed, the District Court noted that Warden McMann had changed certain customs of nudity and cell conditions after he found out about Wright, and had made major corrections in the segregation unit when certain conditions came to his attention. In addition, the District Judge declined to award punitive damages against petitioner McMann because there was not enough evidence to find deliberateness or recklessness on McMann's part. Wright's testimony also showed that McMann granted him permission to have his eyeglasses, while he was in the strip cell in 1965, and granted him permission to have the remainder of his legal materials when he left the strip cell in March, 1965.

In affirming the damage award, the Court of Appeals stated that although the District Court had made no findings with respect to petitioner's actual knowledge of Wright's situation, and that a remand to the District Court for more specific findings would not be inappropriate, there was "abundant" evidence in the record from which the Court of Appeals could conclude that McMann actually knew of the conditions which Wright endured. This evidence consisted of McMann's answer to Wright's complaint, which admitted that strip cells were used in segregation and contained only bare necessities; Wright's testimony that during an interview with FBI agents, one of the agents said he had spoken to the warden; McMann's having returned Wright's eyeglasses and legal materials on Wright's complaint; and McMann's having read and initialed a memorandum to the Commissioner in which Wright described the conditions he endured in the strip cell.

The Court of Appeals did not base its decision solely on this ground, however, but went on to hold that McMann was chargeable with knowledge as a result of his statutory and administrative responsibilities in running the institution:

> "Furthermore, [McMann] was charged with having such knowledge. Ultimate responsibility for the operation of the segregation cells was his, as is made clear from trial testimony, the Employees Rule Book of the New York State Department of Correction then in effect, and section 18, N.Y. Correction Law, McKinney's Consol. Laws c. 44 (1968), as amended L. 1970, c. 476, § 4 (1971 Supp.). Furthermore, section 114-a of the New York Correction Law required that the warden
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> shall cause to be kept a daily record of the proceedings of the prison, in which shall be entered a note . . . of every punishment inflicted on a prisoner, the nature and amount thereof and by whom it was inflicted, and also a memorandum of every well-founded complaint made by any prisoner of bad or insufficient food, want of clothing, or cruel or unjust treatment by a guard; . . ." (Appendix "A" at 17a-18a.) at 107).

The Court of Appeals concluded that because petitioner knew or should have known of the conditions in the segregation cells, and was ultimately responsible for permitting such conditions to exist, petitioner should be liable in damages to respondent Wright and should not be permitted to shift his responsibility to subordinate employees.

While we understand the reluctance of the Court of Appeals to deny damages to a prisoner who has suffered what the District Court found to be violation of his rights under the Eighth Amendment, we submit that this affirmance of the damage award by the Court of Appeals was tantamount to holding petitioner vicariously liable for the acts of subordinate employees. We believe that this holding represents an unwarranted extension of liability under

the Civil Rights Act, and presents an issue which should be resolved by this Court in view of a conflict in the decisions of other Circuit Courts of Appeal.

In *Hesselgesser* v. *Reilly*, 440 F. 2d 901 (7th Cir. 1971), the Court of Appeals for the Ninth Circuit held that a sheriff was liable under 42 U.S.C. § 1983 for the actions of his deputy because of state statutes which specifically imposed liability on the sheriff for the negligence and misconduct of his subordinates. However, in discussing the general principles of liability under the Civil Rights Act the Court said:

> "The Civil Rights Act does not itself specifically establish a basis for liability, vicarious or otherwise, against persons who do not participate in a civil rights violation. The applicable section, 42 U.S.C. § 1983, speaks only of '[e]very person who * * * subjects, or causes to be subjected, any citizen * * * to the deprivation of any rights * * *.' Thus if one who did not participate in such violation is to be held liable for such civil rights violation of another on principles of vicarious liability, or by reason of statutory responsibility, it must be because: (1) the Civil Rights Act gives recognition to the laws of the states pertaining to such liability and, (2) the laws of the particular state where the action arose *create such liability.*" (440 F. 2d at 902-03; emphasis added.)

In the instant case the Correction Law and the Employees Rule Book of the then Department of Correction empowered the warden of a state prison to direct and define the work of subordinate personnel, to discipline errant employees and to promote the rehabilitation and safety of inmates. However, none of these statutory or administrative directives established any personal liability on the part of the warden for the misconduct of subordinate personnel, who are civil service employees of the state and not the employees of the warden. Cf. *Sanberg* v. *Daley*, 306

F. Supp. 277, 278 (N.D. Ill. 1969); *Salazar* v. *Dowd*, 256 F. Supp. 220 (D. Colo. 1966). Indeed, under the then applicable state statutes, respondent's claims for mistreatment in the state courts would have had to have been brought in the Court of Claims as a claim against the State of New York, and not against the Warden personally. See former Section 24, New York Correction Law, repealed L. 1971, c. 1104.

In *Adams* v. *Pate*, 445 F. 2d 105 (7th Cir. 1971), the Court of Appeals affirmed the dismissal of a complaint brought by an inmate against the warden, pursuant to 42 U.S.C. § 1983, where the inmate alleged that he had been beaten by guards and had been confined in segregation in violation of the Eighth Amendment and the Due Process Clause. In denying relief the Court noted: "Where monetary damages, as distinguished from equitable relief, is sought under the provisions of the Civil Rights Act the doctrine of respondeat superior does not apply; personal involvement of the defendant is required. Cf. Schnell v. City of Chicago, 7 Cir. 407 F. 2d 1084, 1086." (445 F. 2d at 107, n. 2). The Court further stated, in terms relevant to the facts in the instant case:

> "Insofar as Adams' complaint seeks recovery for the alleged beatings it is wholly insufficient to state a claim against the defendant [warden]. It totally fails to allege overt acts on the part of Warden Pate or that the alleged beatings were administered at the direction of the Warden or with his knowledge and consent. All the complaint alleges in this respect is that the plaintiff's mother, after a visit to him at the prison, informed Warden Pate of the beatings at the prison but he did nothing to stop them." (445 F. 2d at 107).

In *Kish* v. *County of Milwaukee*, 441 F. 2d 901 (7th Cir. 1971), two inmates of a county jail brought suit under the Civil Rights Act against the county itself, the County Board of Supervisors and the sheriff of the county, al-

leging that these officials had failed to insure plaintiffs' safety from physical and homosexual assaults. In affirming the denial of relief by the District Court, the Court of Appeals rejected numerous contentions of what the defendant sheriff could have done to prevent homosexual assaults, and noted that the sheriff had made some efforts to relieve overcrowding, which was found by the District Court to be the true cause of the plaintiffs' difficulties. Similarly, in the instant case, the District Court made a specific finding that petitioner McMann, to his credit, had made corrections in the segregation unit when certain conditions came to his attention, and had changed certain customs of nudity and cell conditions when he found out about Wright.

While the Court of Appeals for the Seventh Circuit appears to be entirely opposed to the imposition of vicarious liability under the Civil Rights Act, and the Court of Appeals for the Ninth Circuit appears to be opposed to such liability unless it is found in local law, two other Courts of Appeal appear to have taken a different view of this issue.

In *Roberts* v. *Williams,* 456 F. 2d 819 (5th Cir. 1971), cert. denied sub nom. *Roberts* v. *Smith,* 404 U.S. 866 (1971), the Court of Appeals affirmed a damage award under the Civil Rights Act against a prison superintendent who had failed to give proper instruction to a trusty in the handling of deadly weapons. The District Court had found that because of the superintendent's failure to give such instruction in the use of a firearm, and because of the trusty's negligence in handling a firearm, the plaintiff was needlessly and permanently injured when the trusty accidently discharged a shotgun in plaintiff's face. While the Court of Appeals noted that callous indifference to suffering at the management level, through sustained knowing maintenance of bad practices and customs, could result in a violation of the Eighth Amendment, it declined to rule on the issue of *respondeat superior* because it believed that the Superintendent was personally

liable for his own negligence and for his failure to abide by his state law duty to provide proper care for the prisoners in his custody. However, the Court intimated that the rejection of *respondeat superior* by the District Court may not have been a correct interpretation of Mississippi law or of the Court of Appeals decision relied upon by the District Judge. (See 456 F. 2d at 822).

In *Carter* v. *Carlson,* 447 F. 2d 358 (D.C. Cir. 1971), the Court of Appeals grappled with the difficult issue of whether supervisory police officers and the District of Columbia itself could be held liable for the misconduct of a police officer who had beaten the plaintiff with brass knuckles. In reversing the decision of the District Court which had dismissed the complaint, the Court of Appeals stated that under *Roberts* v. *Williams, supra,* the supervisory police officers could be held liable for damages under the Civil Rights Act if they had been negligent in training the policeman who injured plaintiff, and if this negligence had resulted in a deprivation of plaintiff's constitutional rights. In addition, the Court held that the District of Columbia could be directly or vicariously liable for the misconduct of its employees, under 42 U.S.C. § 1983, in spite of the decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961), exempting the City of Chicago from such liability. The Court reasoned that *Monroe* was distinguishable because it involved a municipality that was exempted from liability by state law.

These decisions in four other Circuit Courts of Appeal indicate the need for a resolution of the issues raised in the instant case. While the Court below initially predicated its affirmance of the damage award against petitioner on the ground of petitioner's supposed "knowledge" of Wright's mistreatment, it then broadened its ruling to hold petitioner liable on the ground of his statutory and administrative duties as warden of the prison. In so doing the Court below has brought into focus two issues under the Civil Rights Act which require clarification by this Court: (1) the extent to which supervisory

personnel by virtue of their statutory and administrative duties, should be held vicariously liable for the misconduct of subordinate employees; (2) the extent to which supervisory personnel, by virtue of their alleged failure to give adequate supervision or training, should be held personally liable for the misconduct of subordinate personnel. We believe that such elaboration would be particularly appropriate in view of this Court's recent decisions concerning jurisdiction under 42 U.S.C. § 1983 in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971), and *Haines* v. *Kerner*, 404 U.S. 519 (1972).

In addition, petitioner contends that the Court below did not correctly decide the issues of personal and vicarious liability on the record in this case. As we noted before, the District Court made no findings of fact concerning petitioner's actual knowledge of the deprivations respondent endured, and the Court of Appeals made such a determination based on its own reading of the record. However, of the items in the record which the Court of Appeals relied upon to find actual knowledge, only one (Wright's letter to the Commissioner in 1966, which petitioner read and initialed) provided direct proof that petitioner knew the details of the treatment Wright was receiving from the segregation officers. It was after this letter, and Wright's complaint in the District Court, that petitioner issued a directive to the Deputy Warden to end nudity in the strip cells.

Similarly, although the Court below charged petitioner with knowledge of Wright's situation because of petitioner's statutory and administrative duty to supervise the prison in which Wright was confined, the Court ignored the fact that New York law (unlike the state laws noted in the cases above) did not impose on petitioner any personal liability for the acts of subordinate civil service employees. In addition, departmental rules and policies provided that the Deputy Warden was in charge of disciplinary matters and in charge of supervising the operation of segregation units. One Deputy Warden testified at trial that in 1966 Wright was kept nude in a strip cell at his specific order.

In sum, petitioner prays that this Court will review both the broad issues and the specific issues raised by the decision below, and raised by the apparent conflict in the decisions of other Courts of Appeal concerning liability under 42 U.S.C. § 1983. Petitioner believes that the imposition of vicarious liability or "supervisory" liability under the Civil Rights Act, where no such liability exists under state law, will impede public officials in their work by subjecting them to heavy personal damages for acts of subordinate personnel who are not their employees, and cannot be hired or fired by them. Cf. *Morgan* v. *Willingham*, 424 F. 2d 200, 201 (10th Cir. 1970). In the instant case, petitioner, who did not direct any of the deprivations that were imposed on respondent by the segregation guards, and who took some steps to correct them, is being required solely to pay the damage award out of his own pocket.

CONCLUSION

The instant petition for certiorari should be granted to review the decision of the Court of Appeals for the Second Circuit affirming the award of compensatory damages against petitioner.

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Respectfully submitted,

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